UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOWARD GERALD MINKIN, NO. 20918

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court

for the

Southern District of California, Southern Division

Honorable James M. Carter, District Judge

APPELLANT'S OPENING BRIEF

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SUBJECT INDEX
(Rule 18-2(a))

SUBJECT INDEX - Continued

TABLE OF AUTHORITIES CITED
(Rule 18-2(a))

TABLE OF AUTHORITIES CITED - Continued

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JURISDICTION
(Rule 18-2(b))

Appellant, Howard Gerald Minkin, was indicted, with others, in the United States District Court for the Southern District of California, Southern Division, on charges of conspiracy to smuggle marijuana in violation of United States Code, Title 21, Section 176a, and aiding and abetting marijuana smuggling, in violation of United States Code, Title 21, Section 176a, and Title 18, Section 2. (R. 2-4). The District Court had jurisdiction under United States Code Title 18, Section 3231. This Court has jurisdiction to review the judgment of conviction under United States Code, Title 28, Section 1291.

The case at bar involves the validity, as applied

to appellant, of the following statutes:

70 Stat. 570-571; United States Code, Title 21, Section 176a. (In part).

"Section 2 of the Narcotic Drugs Import and Export Act, as amended, is amended by adding at the end thereof the following:

'(h) Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five nor more than twenty years

and, in addition, may be fined not more than $20,000.00

* * * * *

'For provision relating to sentencing, probation, etc., see section, 7237(d) of the Internal Revenue Code of 1954.'"

70 Stat. 569; Internal Revenue Code of 1954, Title 26. United States Code, Section 7237(d) (In part).

"Upon conviction --

"(1) Of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

* * * * *

the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24-201 and following), as

amended, shall not apply."

68A Stat. 565; United States Code, Title 26, Section 4755(a)(1)

"It shall be unlawful for any person required to register and pay the special tax under the provisions of sections 4751 to 4753, inclusive, to import, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax."

STATEMENT OF THE CASE
(Rule 18-2 (c))

The indictment charged in the first count that appellant conspired with Stanley Alvin Garelle and Kevin Patrick Rafferty to smuggle marijuana into the United States in violation of United States Code, Title 21, Section 176a, and that on or about May 12, 1965, Kevin Patrick Rafferty committed an overt act to effect the object of the conspiracy by entering the United States from Mexico in an automobile containing approximately 79 pounds of marijuana. (R. 2-3). The second count charged that appellant and Stanley Alvin Garelle aided and abetted the smuggling of the 79 pounds of marijuana with which Kevin Patrick Rafferty entered the United States on or about May 12, 1965. (R. 4).

Appellant was tried alone. Only the second count of the indictment was submitted to the jury. (Rep.Tr. 167, 208-209). It found appellant guilty. (R. 25). He was sentenced to the five year minimum term provided in United States Code, Title 21, Section 176a.

Evidence

According to the evidence adduced by the Government, Kevin Patrick Rafferty was an admitted smuggler. (Rep.Tr. 92, 106-107). He had recently attempted to smuggle marijuana into the United States, but had lost the contraband in the mountains while attempting to cross the

border. (Rep.Tr. 107-108). He testified that appellant knew of his smuggling activities and had agreed to raise money for a new smuggling venture. (Rep.Tr. 92). According to Rafferty and Garelle, appellant did supply them with money. (Rep.Tr. 93-95, 130-131). They went to the interior of Mexico, purchased the marijuana, and returned to Tijuana. (Rep.Tr. 95-98).

Rafferty and Garelle were apprehended by an Immigrant Inspector at about 2:45 P.M. on May 12, 1965, in the act of attempting to bring the marijuana by automobile through the Port of Entry at San Ysidro. (Rep.Tr. 59-62). They and the contraband were delivered to a Customs Agent. (Rep.Tr. 62-63, 65-67). By 3:00 P.M. they were in the Customs Agency office. (Rep.Tr. 76). Rafferty testified:

> "THE CLERK: Would you state your name, please.
>
> "THE WITNESS: Kevin Rafferty.
>
> "THE COURT: You are represented by an attorney, are you not?
>
> "THE WITNESS: I am, sir, but he is not in court now.
>
> "THE COURT: And you discussed with him whether or not you should testify in this case.
>
> "THE WITNESS: He told me to give the Court my complete cooperation.

'THE COURT: He knows you are here testifying?

"THE WITNESS: Yes, sir.

"THE COURT: All right.

DIRECT EXAMINATION" (Rep.Tr. 90).

* * * * *

"A When we were arrested -- I would like to bring this up, as far as the persuasion bit goes -- I was sick. I asked Mr. Ellis if I could go to the bathroom. He took me to the bathroom, and in taking me to the bathroom, he said to me -- you know, I had refused to give any testimony. We had made an agreement prior to being arrested, myself and Mr. Garelle, that if we were arrested, we would zip our lips and not say a word, but when we were arrested, they put us in this small, little room and it really made me -- I just couldn't fathom five years of that -- and Mr. Ellis said to me that he had me cold, and it was true. He had caught me

with marijuana in my possession, and he told me if I -- he told me I might as well give myself any opportunity there was that if -- he said to me, 'Just come clean and cooperate because fighting--' you know, they had me cold anyhow, so I just, I asked to speak to Mr. Garelle, and I spoke to Mr. Garelle, and we gave Hyman up." (Rep.Tr. 109-110). "Hyman", is appellant. (Rep.Tr. 92).

* * * * *

"THE WITNESS: After thinking it over, myself and Mr. Garelle, after thinking it over, that it would be better for us and our futures, we decided to turn Mr. Minkin in. Mr. Ellis did not want to take any chances. Apparently he had, maybe somebody had tried to fool him in the past years -- he asked me if I had a meeting with Mr. Minkin in San Francisco?

* * * * *

"THE WITNESS: I told him nothing was definite because the time of my arrival was not definite. It was illegal and we were dealing in contraband

goods, and you can't really put a time or date on it, so he told me, 'Could you call him up?' so I had Mr. Minkin's number in my address book, so I called him up and he called me back and I encouraged the conversation to prove to him that we were not putting him on; that is trying to fool him, and that is the basis." (Rep.Tr. 142).

* * * * *

"Q Now, you intended in this conversation you started with the word, "Shalom" to create in the mind of Mr. Minkin that you were out somewheres free, that you weren't under arrest. You wanted to conceal that, didn't you? That was your first thought.

"A Yes, sir.

"Q Wasn't that also an understanding you had with Mr. Ellis that you would start your conversation along these lines and conceal the fact that you were under arrest?

"A Well, as I said earlier, the phone --

"THE COURT: The question is: was

there or was there not an understanding with Mr. Elliz?

"THE WITNESS: I had no understanding with Mr. Ellis as far as the content of the conversation. He asked me for proof I had no meet with Mr. Minkin, I had no place to meet him and drop the grass off. I was supposed to call him when I got back to San Francisco. They asked me -- well, they told me, 'If you're going to cooperate, let's get up there now and make the meeting.' I told them I had no meeting.

"Then I thought in my mind, well, Mr. Minkin owed me money. He had not given me all the money for the trip, and I thought that if I called him up, I might be able to satisfy Mr. Ellis's curiosity in regards to me telling the truth or not.

"BY MR. FRIEDMAN:

"Q It was more than curiosity.

"A Yes, it was.

"Q The purpose of it was to try to implicate Mr. Minkin, so you would

get a lighter sentence; isn't that the purpose of it?

"A Well, I'm hoping for it. You know I would like to eradicate the whole mess, but I don't see how it could be possible, sir. I have not been promised anything, sir. That's all I can say." (Rep.Tr. 145-146).

Customs Agent Ellis testified:

"Q Did you induce Mr. Rafferty at that time to make a phone call to Mr. Minkin?

"A Mr. Rafferty did make a phone call to Mr. Minkin.

"Q Did you induce him to do so?

"A I don't know how we could call this induced part.

"THE COURT: That's a conclusion. If you want to ask the conversation, if you want it, you can have it.

* * * * *

"Q You say he made a conversation while in your custody.

"A Yes, he did.

"Q And you had a monitoring device that you listened in when he made it; is

that right?

"A Yes I did. (Rep.Tr. 77).

* * * * *

"Q And in your presence did he try to make that call around 3:00 o'clock in the afternoon?

"A I think it was a little later than 3:00 o'clock; probably in the neighborhood of 5:00.

"Q Well, he tried to make it at 3:00 first and then had to wait there about two hours for an answer.

"A No. It was someplace in the neighborhood of 5:00 o'clock when he made his first call.

"Q When did he get the answer, or get a call back? He didn't get Mr. Minkin right away, did he?

"A No, sir.

"Q So he waited there and you waited with him, right?

"A Yes.

"Q Now, when did he make contact with Mr. Minkin?

"A Mr. Minkin returned his call at approximately, I would say, five

minutes or fifteen minutes after 6:00. I don't recall the exact minute.

"A That would be about an hour after he put the call in?

"A Approximately, yes.

"Q All that time you waited patiently there with your monitoring device; is that right?

"A Yes, sir.

"Q Did you induce Mr. Rafferty to tell -- first, to conceal the fact he was under arrest when he called Minkin?

"A That's true.

"THE COURT: Wait a minute. The question is: did you induce him to conceal the fact that he was under arrest? Induce is a conclusion.

"MR. FRIEDMAN: The witness has answered, your Honor. He said, 'That's true.'

"THE COURT: I don't think he understood the question; is that right?

"THE WITNESS: I didn't understand it in that respect.

"MR. FRIEDMAN: I move to strike.

"THE COURT: State your objection.

"MR. FRIEDMAN: My objection is that I object to this witness being bailed out by the Court. He has already answered the question.

"THE COURT: Overruled. Be seated. He said he misunderstood.

"MR. FRIEDMAN: What is your understanding?

"Would you read that question back. "(Reporter read: 'Did you induce Mr. Rafferty to tell -- first, to conceal the fact he was under arrest when he called Minkin?' and 'That's true.')

"THE COURT: All right. You want to state something further?

"THE WITNESS: I would like to explain on this point here.

"MR. FRIEDMAN: I didn't ask for an explanation yet.

"THE COURT: He has asked to explain; overruled.

"THE WITNESS: The 'induced' part that counsel is making here, my 'inducing' part is that I convinced the

men to cooperate with me in making this phone call.

"As to the use of force or anything of that nature, I had nothing in mind, to the meaning of the induced part.

"BY MR. FRIEDMAN:

"Q Is that your explanation?

"A Yes, sir.

"Q That you weren't using force; is that what you meant?

"A No, sir; absolutely not.

"Q What kind of persuasion were you using?

"A Word of mouth.

"Q What were you telling Rafferty he would get if he could entrap in some way Mr. Minkin to admitting a possible connection with Mr. Rafferty's carrying the marijuana across the border?

"A He was --

"THE COURT: These questions are not proper. What are you sitting there for Mr. Johnson? Entrap is a legal question.

"MR. JOHNSON: Yes, I will object.

It is argumentative also.

"THE COURT: If you want the conversations, you can have them.

"Take a recess until 1:30.

"Remember the admonition of the Court.

"(The court recessed at 12:05 p.m., November 2, 1965, until 1:30 p.m., November 2, 1965.)" (Rep.Tr. 77-80).

* * * * *

"Now, did you tell us that you didn't use force to get him to make this call, but you used another kind of persuasion. What was the other type of persuasaion you used to get him to make this call?

"THE COURT: You want the conversation?

"MR. FRIEDMAN: No, I don't.

"THE COURT: How can he answer without giving his conclusion?

"MR. FRIEDMAN: Your Honor, as a matter of fact, the purpose of these questions is to solicit the circumstances under which this con-

versation was secured, and make a motion out of the presence of the jury.

"THE COURT: I understand, but you may ask the witness for facts, but you cannot ask for conclusions.

"MR. FRIEDMAN: I agree. I'm trying to do it factually, but I don't want to get into the conversation because that will be the substance of a motion out of the presence of the jury.

"THE COURT: You may ask leading questions. It is cross examination and you may say, 'Did you do this by talk?' or, 'Did you do it by twisting his arm?'

"You may ask leading questions -- it is cross examination -- but you can't ask for his conclusions.

"BY MR. FRIEDMAN:

"Q What did you say to Rafferty, or put it this way: what was the conversation between you and Rafferty which led to his making this phone call?

"A I asked Mr. Rafferty concerning

the marijuana and he said it was his and he was in business with another man by the name of Hyman Minkin who furnished the money for him and, with that in mind, I asked him if he would cooperate with the government and make the phone call to Mr. Minkin, who was supposed to have been then waiting for a phone call in San Francisco. And Mr. Rafferty said he would, and he made the phone call.

"Q All right. Now in the conversation with Mr. Rafferty, while Mr. Rafferty was making this phone call, did you promise Mr. Rafferty anything in exchange for attempting to secure, if he could, some admission of some kind of complicity in this act of taking the marijuana from Minkin? Did you promise him anything?

"A I did not.

"Q Did you ask him to conceal the fact that he was under arrest?

"A I don't recall that I asked him to conceal those facts; however, I believe he did it himself.

"Q Did you overhear him say he was at a motel?

"A No, I did not.

"Q What did Mr. Rafferty indicate to you he expected from you as an agent of the government in exchange for attempting to implicate a man in San Francisco?

"A Nothing.

"Q You had him cold with 76 pounds of marijuana, right?

"A Yes, sir." (Rep.Tr.82-84).

The telephone conversation between appellant and Rafferty was recorded. The recording was ultimately played to the jury. (Plaintiff's exhibit 10, Rep.Tr. 150-151). During the conversation Rafferty asked appellant to send him money, which appellant agreed to do. (Rep.Tr. 140-141). Rafferty said, "I have got the grass." Appellant replied, "Mazeltoff.", an expression meaning either congratulations or good luck. (Rep.Tr. 127-128). Appellant subsequently put $200.00 in Rafferty's bank account.

Appellant's trial began on November 2, 1965. (Rep. Tr. 42). On that date the cause was severed as to Garelle and Rafferty. (R. 40). They both testified against appellant. Rafferty testified as to his reasons for doing so, as follows:

"Q You are fully cooperating now, is that it, as your attorney advised you to, with the United States Attorney?

"A Yes, sir.

"Q Now, you were indicted, were you not, along with the indictment, United States of America v. Stanley Alvin Garelle, Kevin Patrick Rafferty, Howard Gerald Minkin. Were you one of the three defendants?

"A Yes, sir.

"Q But the indictment against you has now been disposed of, has it not, between you, your attorney and the United States Attorney? You have arranged for a plea to a lesser charge?

"A I am hoping for a plea to a lesser charge but no arrangement was made, sir.

"THE COURT: The records of this court show that the trial of this defendant and Garelle has been severed. The indictment has not been disposed of.

"MR FRIEDMAN: It has been severed.

"THE COURT: For separate trial.

"BY MR. FRIEDMAN:

"Q And you and Mr. Gazelle, who hasn't testified yet, in exchange for testifying against Mr. Minkin are going to get a break." (Rep.Tr. 108-109).

"A Not true, sir.

* * * * *

"Q By your present cooperation you believe, do you not, that you are going to get probation on a lesser charge.

"A I wish I could be sure of that, sir.

"Q But you are cooperating.

"A I'm up here, sir. I wouldn't testify against a friend unless I was cooperating.

"Q You wouldn't testify against a friend to exchange five years for probation, five years of imprisonment for probation?

"A Sir, I don't know what you're getting at with me, but I haven't been guaranteed anything. I wish I could get a guarantee off somebody, but I haven't been guaranteed anything.

"I felt being apprehended with that amount of marijuana, it didn't do me any good to fight something I couldn't win.

"Q But this is a way out, is it not, to put the finger on another man who wasn't there.

"A Well, I had a conscience pang after I did it, and I spoke to my attorney in San Francisco who is a friend and he told me that he knows all the circumstances involved in the case and he told me I shouldn't feel morally wrong because Mr. Minkin was involved in it and he has got to take the chance just like everybody else, if he was involved in it, so I feel bad, but I felt I should cooperate.

"Q You don't have the slightest idea that you are probably going to get probation on a different charge at the proper time after testifying against Mr. Minkin? You don't know that?

"A I'm not certain of it, sir; I'm hoping for it.

"THE COURT: Let me say that whether

anybody gets probation or goes to jail rests with the Judge and not with anybody else.

"MR. FRIEDMAN: That is true, your Honor.

"BY MR. FRIEDMAN:

"Q But isn't it true that a different charge is going to be filed against you other than that listed in that indictment?

"A I'm not aware of it, sir.

"Q And that that charge does not carry with it the five-year mandatory prison sentence.

"A I think if you are referring to a tax act charge, I think that carries two to ten.

"Q The new charge.

"A I said, if you are referring to a tax act charge, that's a two to ten penalty, sir.

"Q And that's the one your hoping to get.

"A I would like to get it dismissed, sir. That's what I would like.

"Q You might get that, too; isn't that possible?

"A It's wholly improbable.

"Q If you cooperate.

"A How much can I cooperate?

"Q Like you're doing now." (Rep. Tr. 110-112).

On November 16, 1965, an information was filed, in which Rafferty was charged with illegal importation of marijuana without the payment of tax in violation of United States Code, Title 26, Section 4755(a)(1), and Garelle was charged with aiding and abetting the commission of that offense. (R. 47). Both pleaded guilty and on January 4, 1966, were granted five years probation pursuant to United States Code, Title 18, Section 5010(a). (R. 42-43). The indictment in the case at bar was dismissed as to Rafferty and Garelle on the same day. (R. 41).

Questions Involved.

1. Does appellant's conviction of aiding and abetting violation of United States Code, Title 21, Section 176a, deny him due process of law in violation of the Fifth Amendment to the United States Constitution, because there is no reasonable basis of classification by which violation of that section can be distinguished from a violation of United States Code, Title 26, Section 4755(a)(1)? Does application to appellant of the mandatory minimum punishment for violation of United States Code, Title 21, Section 176a, deny him due process of law, because it is a penalty for

pleading not guilty and because vesting the United States Attorney with the arbitrary power to restrict the court in the matter of sentence is an unconstitutional delegation of legislative and judicial power to the executive branch of the Government? These questions are raised by appellant's indictment under United States Code, Title 21, Section 176a, the submission of the issue to the jury under the indictment, and the pronouncement of judgment pursuant to the mandatory provisions of United States Code, Title 21, Section 176a and Section 7237(d) of the Internal Revenue Code of 1954. (R.2-4, 28, Rep.Tr. 208-210, 253-255).

2. Was appellant denied due process of law in violation of the Fifth Amendment to the United States Constitution by the use against him of coerced testimony of his codefendants? This issue was raised by the reception in evidence of the testimony of appellant's codefendants, Kevin Patrick Rafferty and Stanley Alvin Garelle, although they did not voluntarily request to testify, but rather, as is shown by the evidence hereinabove set forth, were coerced to testify by the threat of the mandatory penalty under United States Code, Title 21, Section 176a, and the inducement that, if they gave testimony which satisfied the Government, they would be permitted to plead to a, "tax count". (Rep.Tr. 90 et seq., 129 et seq., 138 et seq.).

3. Did the trial court err in denying appellant's motion for exclusion of witnesses without considering the

matter on its merits? This issue is raised by appellant's motion for exclusion of witnesses. (Rep.Tr. 48).

SPECIFICATION OF ERRORS
(Rule 18-2(b))

1. The trial court erred in trying the case upon the indictment charging violation of United States Code, Title 21, Section 176a. (R. 2-4).

2. The trial court erred in submitting the case to the jury upon the charge contained in the indictment. (Rep.Tr. 208-210).

3. The trial court erred in sentencing appellant under the mandatory provisions of United States Code, Title 21, Section 176a and Section 7237(d) of the Internal Revenue Code of 1954. (R. 28, Rep.Tr. 253-255).

4. The trial court erred in severing the cases of Kevin Patrick Rafferty and Stanley Alvin Garelle from that of appellant. (R. 41).

5. The trial court erred in permitting Kevin Patrick Rafferty to testify as a witness. (Rep.Tr. 90 et seq., 138 et seq.).

6. The trial court erred in permitting Stanley Alvin Garelle to testify as a witness. (Rep.Tr. 129 et seq.).

7. The trial court erred in denying appellant's motion for exclusion of witnesses. (Rep.Tr 48).

ARGUMENT
(Rule 18-2(e))

Summary

United States Code, Title 21, Section 176a, and Title 26, Section 4755(a)(1), both proscribe the unlawful importation of narcotics. One carries a mandatory five year minimum penalty, while the other does not. Since both statutes prohibit the same conduct, the United States Attorney has the arbitrary power to choose between them. Appellant contends that the existence of such an arbitrary power denies him due process of law in violation of the Fifth Amendment to the United States Constitution. This arbitrary power permits the District Attorney to coerce guilty pleas and to punish pleas of not guilty by denying defendants who stand trial the opportunity for probation. He contends that his conviction in the case at bar is such punishment, and that it therefore denies due process of law. He also contends that delegation to the United States Attorney of the power, in his absolute discretion, to determine whether in a particular case the District Court will be permitted to grant probation, violates Article I, Section 1, and Article III, Section 1, of the Constitution.

The power to arbitrarily choose between Title 21, Section 176a, and Title 26, Section 4755(a)(1), also provides an instrument for coercion of defendant witnesses. That power was used in the case at bar to coerce appellant's

codefendants to testify against him. The process was facilitated by the action of the trial court in severing the cases. The United States Attorney was thereby enabled to withhold the reward of the lesser offense until after the codefendants had testified, thereby inducing them to believe that prosecution for the lesser offense depended upon their giving testimony favorable to the Government. Appellant contends that admission against him of evidence so obtained denied him due process of law.

Appellant also contends that the trial court erred in denying his motion for exclusion of witnesses. Although the granting of such a motion lies in the discretion of the court, in the case at bar the court abused its discretion by denying the motion without ascertaining any of the facts upon which such a ruling should be based.

I

APPELLANT'S CONVICTION OF AIDING AND ABETTING VIOLATION OF UNITED STATES CODE, TITLE 21, SECTION 176a, DENIES HIM DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BECAUSE THERE IS NO REASONABLE BASIS OF CLASSIFICATION BY WHICH VIOLATION OF THAT SECTION CAN BE DISTINGUISHED FROM A VIOLATION OF UNITED STATES CODE, TITLE 26, SECTION 4755(a(1). APPLICATION TO APPELLANT OF THE MANDATORY MINIMUM PUNISHMENT FOR VIOLATION OF UNITED STATES CODE, TITLE 21, SECTION 176a, DENIES HIM DUE PROCESS OF LAW, BECAUSE IT IS A PENALTY FOR PLEADING NOT GUILTY, AND BECAUSE VESTING THE UNITED STATES ATTORNEY WITH THE ARBITRARY POWER TO RESTRICT THE COURT IN THE MATTER OF SENTENCE IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AND JUDICIAL POWER TO THE EXECUTIVE BRANCH OF THE GOVERNMENT.

Appellant was convicted of aiding and abetting a violation of United States Code, Title 21, Section 176a. That statute provides, in part:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner

facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.00."

By virtue of another provision of Title 21, Section 176a, and Section 7237(d) of the Internal Revenue Code of 1954, appellant could not be granted probation.

As a result of the commission of the offense which appellant was found to have aided and abetted, his codefendants were convicted on guilty pleas of violating United States Code, Title 26, Section 4755(a)(1). That section provides:

"It shall be unlawful for any person required to register and pay the special tax under the provisions of Sections 4751 to 4753, inclusive, to import, manufacture, produce, compound, sell, deal in, dispense,

> distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax."

The penalty for a first offense violation of this section is not less than two nor more than ten years, and a fine of not more than $20,000.00. Probation is permitted. (United States Code, Title 26, Section 7237). Both of appellant's codefendants were granted probation, while appellant received the mandatory minimum five year prison sentence. (R. 28, 42, 43).

The act which was the basis of the convictions of all three defendants was the attempt by Garelle and Rafferty to bring the marijuana through the Port of Entry without declaring it and without paying the tax on it. This one act necessarily violated both statutes. Moreover, insofar as the two statutes relate to importation of marijuana, it would be impossible to violate one without violating the other. One could not declare marijuana at the border and bring it in without registering and paying the tax. On the other hand, it would be impossible to register and pay the tax on smuggled marijuana. Thus, insofar as they relate to importation, the difference between the two laws is in the penalty prescribed for their violation. Thus, the two statutes, as applied here, vest in the United States Attorney the power to determine what sentence he will permit

the United States District Judge to impose for the commission of a particular unlawful act. Appellant submits that the statutes so applied deny him due process of law in violation of the Fifth Amendment to the United States Constitution, in a number of respects.

Due process requires equality of treatment under the law. Similar acts require similar punishments. While Congress may vest the trial court with discretion as to the extent of punishment in a particular case, so that the court may take account of individual differences in fashioning an appropriate sentence, any differences in the range of discretion permitted the court as to different defendants must rest upon some reasonable classification. Here, the three defendants were identically situated -- they were convicted of the same act. The trial judge found that the two codefendants were deserving of probation. That finding does not entitle appellant to probation. The court might have found that he did not deserve it. However, he was entitled to have the question of probation weighed in the same scales as his codefendants. The denial of that right, indeed of the right to have it weighed at all, was a denial of due process of law.

Although appellant and his two codefendants were indicted together, their cases were severed at the time of trial. During the trial the following occurred:

"MR. FRIEDMAN: There is one more

thing, your Honor.

"The United States Attorney and myself are discussing a possible adjustment of this case. May we have a short recess to discuss it?" (Rep. Tr. 126).

Whether or not this Court wishes to draw any inferences as to what happened during the recess, it is apparent that the reason that appellant was convicted of violating Title 21, U.S.C., Section 176a, while the others were convicted of violating Title 26, Section 4755(a)(1), is that they elected to plead guilty, while he decided to stand trial. It is surely a denial of due process to penalize a defendant for standing trial.

Some judges make a practice of punishing more severely defendants whom they believe to have testified falsely in their own defense. Because of the sanctity of the right to trial, we doubt the wisdom of this practice. However, even if such increased punishment is proper, the statutory scheme here involved does not achieve it, for the choice of punishments does not depend upon whether the defendant testifies falsely, or testifies at all, and it does not vest the discretion in the trial judge. The statutes, as here applied, constitute the imposition of an additional penalty for pleading not guilty rather than guilty. Appellant submits that such a result was never intended by

Congress and that it denies due process of law.

Article III, Section 1, of the Constitution vests the judicial power of the United States in the Supreme Court and such other courts as Congress may create. The imposition of sentence, within the limits fixed by Congress, is a judicial act. The fixing of the limits is a legislative act. Legislative power is vested in Congress by Article I, Section 1, of the Constitution. Appellant recognizes that it was within the power of Congress to fix five years imprisonment as the minimum penalty for the act of which he was found guilty, and to provide that a person so convicted could not be granted probation. However, because it adopted 26 U.S.C. 4755(a)(1), as well as 21 U.S.C. 176a, Congress did not adopt such a limitation. Moreover, it may not be assumed that Congress would have adopted the stringent penalties for violation of 21 U.S.C. 176a, if it had not known that the alternative of 26 U.S.C. 4755(a)(1) was available. Congress presumably intended that both sections should be utilized, but it probably never anticipated that the choice would be based upon whether or not a defendant pleaded guilty. Whatever the intent of Congress, however, the effect of the two statutes taken together is to delegate to the United States Attorney the power to determine the limits within which the District Court may act, a legislative function, and the ultimate power to determine the minimum sentence to be imposed, a judicial act. The unconstitutional delegation of

these powers to appellant's prosecutor is a violation of the separation of powers which is a cornerstone of our form of government and a denial of due process of law in violation of the Fifth Amendment to the Constitution.

II

APPELLANT WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, BY THE USE AGAINST HIM OF THE COERCED TESTIMONY OF HIS CODEFENDANTS. THE COERCION CONSISTED IN HOLDING OVER THE WITNESSES UNTIL AFTER THEY HAD TESTIFIED THE THREAT OF THE MANDATORY MINIMUM PENALTY FOR VIOLATION OF UNITED STATES CODE TITLE 21, SECTION 176a, ALTHOUGH THEIR CHARACTER AND OFFENSE MERITED CONVICTION OF VIOLATING UNITED STATES CODE TITLE 26, SECTION 4755(a)(1), AND A GRANT OF PROBATION WITHOUT CONFINEMENT.

In JACKSON vs. DENNO, 378 U.S. 368, 84 S.Ct. 1774, the United States Supreme Court held that due process was violated by a rule of law which permitted submission to a jury of an extrajudicial confession of a defendant, without a prior judicial determination that the confession was voluntary. The basis of the ruling was that, even if the jury was instructed to disregard a confession which they found to be involuntary, the procedure did not provide adequate protection against the possible use of an involuntary confession against the defendant.

In PEOPLE vs. UNDERWOOD, 61 Cal.2d 113, 37 Cal. Rptr. 313, the Supreme Court of California held:

> "The same policy considerations which preclude the use of an involuntary statement of a defendant require that the prosecution be precluded from impeaching any witness by the use of an involuntary

> statement given as the result of pressures exerted by the police. Such a statement by a witness is no more trustworthy than one by a defendant, its admission in evidence to aid in conviction would be offensive to the community's sense of fair play and decency, and its exclusion, like the exclusion of involuntary statements of a defendant, would serve to discourage the use of improper pressures during the questioning of persons in regard to crimes." (PEOPLE vs. UNDERWOOD, 61 Cal.2d 113, 124, 37 Cal.Rptr. 313, 319. See also California Evidence Code Section 1204, and the comment of the California Assembly Committee on Judiciary with reference thereto.)

Thus, the rule of JACKSON vs. DENNO, 378 U.S. 368, 84 S.Ct. 1774, applies to the extrajudicial statements of witnesses as well as those of the defendant on trial.

JACKSON vs. DENNO and PEOPLE vs. UNDERWOOD deal with extrajudicial statements. The case at bar concerns the testimony of witnesses in court. We must, therefore, consider whether the principle of JACKSON vs. DENNO and PEOPLE vs. UNDERWOOD is applicable to testimony in court.

The in-court analogue of JACKSON vs. DENNO is

disposed of by express constitutional provision. The Fifth Amendment provides, in part:

> "No person. . .shall be compelled in any criminal case to be a witness against himself,"

The testimony of a defendant who testifies involuntarily is therefore inadmissible. The crux of the issue presently under discussion is whether the analogy of PEOPLE vs. UNDERWOOD is also applicable to exclude the coerced testimony of a defendant against his codefendant. Appellant respectfully submits that it is.

At common law a defendant in a criminal case was not a competent witness. The common law rule is aborogated for the federal courts by United States Code, Title 18, Section 3481, which provides:

> "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

This statute governs the admissibility of the testimony of a defendant against his codefendants. (ROWAN vs. UNITED STATES,

5 Cir. 1922, 281 Fed. 137, 139; UNITED STATES vs. BECK, 7 Cir. 1941, 118 F.2d 178, construing predecessors of the present statute). The statute cannot be circumvented by the expedient of severing the trials of codefendants jointly charged. Thus, if Garelle and Rafferty testified voluntarily and at their own request, their testimony was admissible. If, on the other hand, their testimony was coerced, the conditions of the statute were not met, and their testimony was inadmissible.

Garelle and Rafferty were subject to prosecution under either of two statutes. They were fully cognizant that one statute provided for a lesser penalty than the other and that one permitted the granting of probation, while the other did not. They were also aware of the possibility of a dismissal. Rafferty's and Garelle's cases were severed without any guarantee as to which option the United States Attorney would adopt. Rafferty clearly expressed his understanding that the United States Attorney's choice would depend upon the extent to which he, "cooperated".

"A I would like to get it dismissed, sir. That's what I would like.

"Q You might get that, too; isn't that possible?

"A It's wholly improbable.

"Q If you cooperate.

"A How much can I cooperate?"

(Rep.Tr. 112).

Otherwise stated, Rafferty believed he did not have the price of an outright dismissal, but that by his testimony he might buy a tax count.

Of course, the testimony of a codefendant is not rendered inadmissible merely because he entertains the hope that he will benefit by testifying. However, where the hope is induced by the prosecution, the testimony is coerced and inadmissible. Appellant submits that the practice adopted by the United States Attorney of postponing until after the codefendants have testified the decision as to which statute he will invoke, has, and is intended to have, the effect of inducing the defendant-witness to believe that avoidance of the mandatory penalty prescribed by United States Code, Title 21, Section 176a, is contingent upon his giving testimony favorable to the Government.

During Rafferty's testimony the trial court said:

"THE COURT: Let me say that whether anybody gets probation or goes to jail rests with the Judge and not with anybody else." (Rep.Tr. 111).

This statement is not accurate, because the court cannot grant probation under United States Code, Title 21, Section 176a. Moreover, taken with the action of the court in severing the cases, the statement clearly suggested that the

court approved the mode of procedure adopted by the United States Attorney and would cooperate in meting out the rewards or punishments which the U. S. Attorney thought the testimony merited.

MIRANDA vs. ARIZONA, 384 U.S. 438, 86 S.Ct. 1602, and the cases leading up to it, have been criticized for applying the standards of the courtroom to the police station. However, we know of no suggestion that courtroom standards are lower than those applied to the police by MIRANDA. We submit that the coercive influences which the Supreme Court sought in MIRANDA to eliminate from custodial interrogation are as nothing compared with the coercion applied to the witnesses in the case at bar. As any lawyer who has represented clients confronted with this procedure knows, Garelle and Rafferty literally had no choice but to testify for the prosecution. The fact that express verbal promises are piously avoided by the Government does not reduce the expectation that testimony favorable to the prosecution will produce the result which it produced in the case at bar. It merely reinforces the belief that the Government's ultimate choice between tax count and smuggling will be based, not upon the intrinsic merit of the case against the testifying defendant, which the Government could evaluate before trial, and which it necessarily does evaluate without trial when all defendants plead guilty, but rather upon the character of the testimony given.

The coercive effect of the procedure adopted in the case at bar is both unique and unnecessary. California deals with the situation presented here by providing by statute for dismissal against a codefendant so that he may testify against another defendant. (California Penal Code Sections1099, 1101). The District of Columbia has a similar statute. (Section 23-110 D.C. Code 1951, CARRADO vs. UNITED STATES, 210 F.2d 712, 718). Although there appears to be no analogous federal statute, a similar procedure would be authorized under Rule 48 of the Federal Rules of Criminal Procedure. Alternatively, Garelle and Rafferty could have been permitted to plead guilty to the tax count before they testified. Either of these approaches would have avoided the coercive effect of putting in the hands of the prosecutor the power to determine the punishment of the witnesses on the basis of the testimony given. The failure to adopt either of them, or some other efficacious procedure, resulted in appellant's conviction on coerced testimony. A conviction so obtained denies due process of law in violation of the Fifth Amendment to the United States Constitution. The judgment must therefore be reversed.

III

THE TRIAL COURT EITHER FAILED TO EXERCISE OR ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO EXCLUDE WITNESSES, BECAUSE THE COURT FAILED TO CONSIDER CIRCUMSTANCES CALLING FOR EXCLUSION AND BECAUSE THE CIRCUMSTANCES MAKE REFUSAL TO EXCLUDE AN ABUSE OF DISCRETION.

At the outset of the trial, the following occurred:

> "MR. FRIEDMAN: May we have an order of exclusion of the witnesses here? I don't know who are going to be witnesses, but I would like to have excluded any witness other than the party testifying.
>
> "THE COURT: Motion denied."

(Rep.Tr. 48).

In WILLIAMSON vs. UNITED STATES, 310 F.2d 192 (1962) 198, this Court said:

> "The practice of excluding witnesses from the courtroom except while each is testifying is to be strongly recommended, particularly where the testimony of the witness is any measure cumulative or corraborative. It is nontheless the uniform federal rule, prevailing also in a majority of the states,

that a motion to sequester is
addressed to the discretion of
the trial court."

In the case at bar the trial judge denied the motion out of hand, without consideration of whether the testimony to be offered would be cumulative or corraborative, or any other factor bearing upon the exercise of discretion. The statement of appellant's counsel made it clear that he lacked sufficient knowledge of the Government's case to make a showing in that regard. The duty of the court was to inquire of counsel for the Government as to facts which might make the granting of the motion appropriate. By ruling without ascertaining the facts, the trial court foreclosed itself from exercising the discretion conferred upon it.

The substantial issues in the case at bar revolved about the credibility of Garelle and Rafferty and the circumstances under which they implicated appellant and Rafferty telephoned appellant from the Customs House. The circumstances in which appellant's codefendants found themselves at the time they testified tended, to say the least, to provide motivation for them to color their testimony. The Government called the customs officials to testify before it called the codefendants. We submit that if ever a refusal to exclude witnesses could be regarded as an abuse of discretion, it must be so regarded in this case. The error was prejudicial and requires reversal.

CONCLUSION

Appellant contends that the trial court committed prejudicial error in denying his motion for the exclusion of witnesses without exercising its discretion on the merits. The ruling on this point was especially prejudicial, since appellant's conviction was predicated upon the testimony of alleged accomplices whose testimony was coerced and who therefore had a motive for coloring their testimony to conform to that given by witnesses who preceded them. Far more serious are the grave constitutional issues raised by the Congressional enactment of the different penalties for commission of the same act under United States Code, Title 21, Section 176a, and Title 26, Section 4755(a)(1), and their application to appellant in the case at bar to determine his penalty and to coerce his codefendants to testify against him. The latter questions are important to appellant, but they are also of general importance. They are important to the members of the bar who defend this type of cases. One day we must explain to a client that, although there is a doubt that the Government can prove the case against him, or a question of law as to his guilt, he cannot afford to take the risk of a defense on the merits. Another time we perform the ritual of obtaining a non-promise of a tax count if our defendant testifies, and the chore of advising the client as to the moral code of the informer. (See Rep.Tr. 110-111). We can rarely adequately

represent two defendants, because our duty to each is to try to trade his testimony against the other for a tax count. In short, it is a dirty business which reflects little credit upon counsel, the Government, or the courts. We ask this Honorable Court to save us from it.

Respectfully submitted,

LANGFORD, LANGFORD & LANE

By_____
J. Perry Langford

Attorneys for Defendant

CERTIFICATE
(Rule 18-2(g))

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____
J. Perry Langford

APPENDIX -- EXHIBIT PART OF RECORD
(Rule 18-2(f))

	Identified	Offered and Received
Plaintiff's Exhibit 10	151	151